

## UIIdaho Law Digital Commons @ UIIdaho Law

---

### Idaho Supreme Court Records & Briefs

---

10-24-2008

# Person v. State Respondent's Brief Dckt. 34919

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

### Recommended Citation

"Person v. State Respondent's Brief Dckt. 34919" (2008). *Idaho Supreme Court Records & Briefs*. 1777.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/1777](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/1777)

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

MARK A. PERSON,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

NO. 34919

**FILED - COPY**

**OCT 24 2008**

Supreme Court \_\_\_\_\_ Court of Appeals \_\_\_\_\_  
Entered on ATS by: \_\_\_\_\_

**BRIEF OF RESPONDENT**

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA**

**HONORABLE JOEL D. HORTON**  
District Judge

**LAWRENCE G. WASDEN**  
Attorney General  
State of Idaho

**STEPHEN A. BYWATER**  
Deputy Attorney General  
Chief, Criminal Law Division

**LISA J. MESLER**  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534

**ATTORNEYS FOR  
RESPONDENT**

**DENNIS BENJAMIN**  
Nevin, Benjamin, McKay &  
Bartlett, LLP  
PO Box 2772  
Boise, ID 83701  
(208) 343-1000

**ATTORNEY FOR  
PETITIONER-APPELLANT**

## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
Nature of the Case .....	1
Statement of Facts and Course of Proceedings.....	1
ISSUE .....	4
ARGUMENT .....	5
The District Court Did Not Err In Dismissing Person's Petition For Post-Conviction Relief Because It Was Time-Barred .....	5
A.    Introduction.....	5
B.    Standard of Review .....	5
C.    The District Court Did Not Err In Dismissing Person's Petition For Post-Conviction Relief Because It Was Time Barred.....	5
CONCLUSION .....	9
CERTIFICATE OF SERVICE.....	10

## **TABLE OF AUTHORITIES**

### **CASES**

### **PAGE**

<u>Evensiosky v. Idaho</u> , 136 Idaho 189, 30 P.3d 967 (2001).....	8
<u>Martinez v. Idaho</u> , 130 Idaho 530, 944 P.2d 127 (1997) .....	5
<u>Miranda v. Arizona</u> , 384 U.S. 436 (1966) .....	1
<u>Sayas v. State</u> , 139 Idaho 957, 99 P.3d 776 (Ct. App. 2003).....	6
<u>State v. Babb</u> , 125 Idaho 934, 877 P.2d 905 (1994) .....	8
<u>State v. Barnes</u> , 113 Idaho 378, 987 P.2d 290 (1999) .....	7
<u>State v. Carlson</u> , 134 Idaho 389, 3 P.3d 67 (Ct. App. 2000) .....	6
<u>State v. Fisher</u> , 123 Idaho 481, 849 P.2d 942 (1993).....	7
<u>State v. Grube</u> , 126 Idaho 377, 883 P.2d 1069 (1994).....	7
<u>State v. Person</u> , 140 Idaho 934, 104 P.3d 976 (Ct. App. 2004) .....	1
<u>State v. Person</u> , 145 Idaho 293, 178 P.3d 658 (Ct. App. 2007) .....	1
<u>State v. Stevens</u> , 115 Idaho 457, 767 P.2d 832 (Ct. App. 1989).....	7

### **STATUTES**

I.C. § 19-4902(a) .....	7, 8
-------------------------	------

### **RULES**

I.A.R. 14(a) .....	6
--------------------	---

## STATEMENT OF THE CASE

### Nature of the Case

Mark A. Person appeals from the order granting the Respondent's motion for summary dismissal, which resulted in the dismissal of his post-conviction relief petition by the district court. (R., 83-84.) Specifically, Person challenges the dismissal of his petition on the ground that it was time barred. (Appellant's brief, p. 3.)

### Statement of Facts and Course of Proceedings

Person entered a guilty plea to second degree murder on August 20, 2002. Following the preparation of a presentence report, he was given a unified life sentence with 20 years fixed. State v. Person, 140 Idaho 934, 936, 104 P.3d 976, 978 (Ct. App. 2004). On direct appeal, the Court of Appeals held that portions of Person's statements to the police during interrogation should have been suppressed pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). Person, 140 Idaho at 941-942, 104 P.3d at 983-984 (Ct. App. 2004).

On remand, Person entered a binding plea agreement with a recommended sentence of a unified 50 years with 15 fixed. State v. Person, 145 Idaho 293, 295, 178 P.3d 658, 660 (Ct. App. 2007). No new presentence investigation was performed before this sentencing by agreement of the parties. Id. A judgment of conviction was entered on September 12, 2005. Id.

On October 31, 2005, Person filed a motion to correct a clerical error (Idaho Court Rules 32 and 36), seeking to have copies of the PSI returned from IDOC, and kept out of their files, or, in the alternative, to have all copies of the

PSI returned to redact any statements found to have been obtained in violation of Miranda. Id. The district court denied the motion on the ground that, while the court agreed that the statements were excludable, Rule 32 does not provide the court with the authority permitting it to redact information from a pre-existing document generated by a separate agency. See Id. at 295, 178 P.3d at 660-63. The Idaho Court of Appeals affirmed the district court's ruling. Id. at 295-96, 178 P.2d at 660-63.

On February 27, 2007, Person filed a pro se petition for post-conviction relief pursuant to Idaho Code Section 19-4901, et seq. (R., pp. 5-11.) He alleged that he had ineffective assistance of counsel in conjunction with the entry of the second Rule 11 plea, resulting in an invalid plea. (R. pp. 8-9.) Person also alleged ineffective assistance of appellate counsel because counsel allegedly failed to advise him as to the correct time calculations on the running of the statute of limitations for post-conviction relief purposes. Id.

The Office of the Attorney General was appointed as a special prosecutor. (R. p. 34.) The State filed an answer to the petition (R., pp. 40-47), citing a number of defenses, perhaps most importantly that the petition was time-barred (R., p. 46). The State asserted that the unappealed underlying conviction was entered on September 5, 2005, after the second plea was given; the one-year time limit for the filing of a petition for post-conviction relief began 42 days later, or October 17, 2005, and ran through October 17, 2006; and, therefore, the petition filed in 2007 was untimely. (R., p. 46.)

The State then filed a motion and brief in support of summary dismissal. (R. pp. 48-49, 53-71.) A hearing was held at the district court level, the Honorable Joel D. Horton presiding, and the case was summarily dismissed on the ground that the petition was time-barred. (R., pp.83-84, Tr., p. 12, Ls. 3-15.)

## ISSUE

Person states the issue on appeal as:

1. Did the district court commit fundamental error in dismissing the petition for post-conviction relief as time-barred on the claim that counsel was ineffective in negotiating an unenforceable plea agreement when the claim was filed well within a year of when the ineffective assistance was and could have reasonably been discovered?

(Appellant's brief, p. 2.)

The State rephrases the issue on appeal as:

Has Person failed to show error in the court order dismissing Person's petition for post-conviction relief because it was time-barred?



## ARGUMENT

### The District Court Did Not Err In Dismissing Person's Petition For Post-Conviction Relief Because It Was Time-Barred

#### A. Introduction

The district court correctly applied the law in dismissing Person's petition for post-conviction relief as being time-barred. Pursuant to Idaho Code Section 19-4902(a) this Court should affirm the lower court in the dismissal of the post-conviction relief petition.

#### B. Standard of Review

The Court of Appeals set forth the standard of review, for cases in this posture, in Martinez v. Idaho, 130 Idaho 530, 944 P.2d 127 (1997), as follows:

On review of a dismissal of a post-conviction application without an evidentiary hearing, we will determine whether a genuine and material issue of fact is demonstrated in the record and whether one party was entitled to judgment as a matter of law. . . . In evaluating a post-conviction claim for summary disposition, the court assumes the truth of the applicant's allegations of fact. . . . Therefore, *we must address only whether, assuming the truth of the facts alleged by Martinez, his claims are time-barred.* Our review of the district court's construction and application of the limitation statute *is a matter of free review.*

Id., at 532, 944 P.2d at 129 (internal citations omitted) (emphasis added).

#### C. The District Court Did Not Err In Dismissing Person's Petition For Post-Conviction Relief Because It Was Time Barred.

In this instance, the focus is on the threshold issue of whether the application was timely filed. A Petitioner must file his post-conviction petition

“within one (1) year from the expiration of the time for appeal . . . .” Idaho Code Section 19-4902(a). An appeal must be filed within 42 days of entry of judgment. I.A.R. 14(a). Failure to file the petition within one year and forty two days from entry of judgment is grounds for dismissal of the petition. See Sayas v. State, 139 Idaho 957, 959, 99 P.3d 776, 778 (Ct. App. 2003) (failure to file a timely petition is grounds for dismissal).

Here, according to the record, Person filed his petition for post-conviction relief on March 7, 2007. (R., pp. 5-11; Tr., pp. 12, L. 3-15, 24-25, p. 13, L.1-4; R., pp 83-84.) The district court found that the “petition was filed more than one year and 42 days after the date of the filing of the final judgment,” and was therefore time-barred.

Person impliedly concedes that the petition for post-conviction relief was not filed more than one year and 42 days after the date of the filing of the unappealed judgment. Instead, Person argues that the district court committed fundamental error by not sua sponte applying a discovery exception and finding the petition timely. (Appellant’s brief, p.3.) Person’s argument fails for two reasons. First, the argument was not preserved, in this case, at the district court level. Second, under Idaho law, there is no discovery exception to the time limit of Idaho Code Section 19-4902(a).

“It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal.” State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). It is equally well settled that the appellate court “will not ‘review a trial court’s alleged error on

appeal unless the record discloses an adverse ruling which forms the basis for an assignment of error.” State v. Barnes, 113 Idaho 378, 384, 987 P.2d 290, 296 (1999) (quoting State v. Fisher, 123 Idaho 481, 485, 849 P.2d 942, 946 (1993)). See also, State v. Grube, 126 Idaho 377, 387, 883 P.2d 1069, 1079 (1994). Whether an issue was preserved presents a “threshold” inquiry. State v. Stevens, 115 Idaho 457, 459, 767 P.2d 832, 834 (Ct. App. 1989) (objections at trial on other grounds did not preserve issue raised on appeal).

Person did not argue to the district court that a “discovery exception” to I.C. § 19-4902(a) was allowed by law or was applicable on the facts. Rather, Person argued that inaccurate advice by his appellate attorney on his second appeal should toll the running of the statute of limitation. (Tr., p. 6, L. 4 – p. 7, L. 6.) The district judge ruled on the only tolling argument before it, rejecting it. (Tr., p. 12, L. 16 – p. 13, L. 4.) Thus, Person neither made a claim for application of a “discovery exception” nor did he obtain an adverse ruling. In short, this issue is not preserved for appeal.

Person, however, claims that the error was fundamental, and therefore a claim he may raise without having raised it to the district court or obtained an adverse ruling. (Appellant’s brief, pp. 3, 6-7.) The Idaho Supreme Court has defined fundamental error as error that:

(1) goes to the foundation or basis of a defendant’s rights, (2) goes to the foundation of a case, or (3) takes from the defendant a right which was essential to the defendant’s defense which no court could or ought to permit the defendant to waive.

State v. Babb, 125 Idaho 934, 941, 877 P.2d 905, 912 (1994). Application of a “discovery exception” does not meet this definition.

As set forth in more detail below, Person has cited to no case that holds that a defendant has any right whatsoever to application of a “discovery exception.” Although application of the statute of limitations may result in dismissal of a post-conviction petition, Person has not shown that application of a “discovery exception” goes to the foundation of his case. Finally, because Person would have the burden of factually proving his discovery exception, and he presented no evidence whatsoever of when he did or could have learned about his claim, Person cannot credibly claim that the district court should have ruled on the matter sua sponte. Person has therefore failed to show that application of a “discovery exception” is so fundamental that the district court’s failure to rule on it sua sponte was fundamental error.

Even if the merits of the claim were preserved, Person has failed to show that, under Idaho law, there is a “discovery exception” to Idaho Code Section 19-4902. In Evensiosky v. Idaho, 136 Idaho 189, 191, 30 P.3d 967, 969 (2001), the Idaho Supreme Court expressly stated that, “There is *no discovery exception in I.C. Section 19-4902*, and the facts of this case do not warrant application of a discovery exception. *I.C. Section 4902 expressly limits a party’s time to bring a claim for post-conviction review to one year.*” Id. at 191, 30 P.3d at 969 (emphasis added).

Here, Person asserts that he is entitled to an exception to the statutory time limit of one-year and forty-two days on the ground that he did not know that

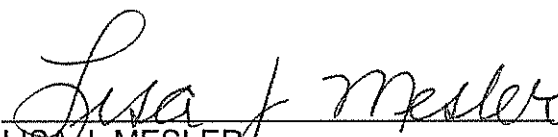
the Department of Correction retained the PSI and that he did not find this out until *after* the time period had run.<sup>1</sup> Person does not cite any cases actually applying a “discovery exception” under Idaho Code Section 19-4902(a). (Appellant’s brief, pp. 4-6 (citing cases that do not actually apply a discovery exception).) To the contrary, the Idaho Supreme Court has rejected application of a “discovery exception” to Idaho Code Section 19-4902(a). Evensiosky, 136 Idaho at 191, 30 P.3d at 969.

The district court concluded Person filed his petition after the limitation period of Idaho Code Section 19-4902(a) had run. This conclusion is not challenged on appeal. Instead, Person claims the district court should have applied a “discovery exception.” This argument fails as it was not preserved. Even if preserved it fails because Idaho Code Section 19-4902(a) contains no “discovery exception,” express or implied. Finally, even if preserved and applicable, the argument fails because Person presented no evidence of when he dismissed the facts supporting his cause of action.

#### CONCLUSION

The State respectfully requests that this Court affirm the district court’s order.

DATED this 24th day of October 2008.

  
LISA J. MESLER  
Deputy Attorney General

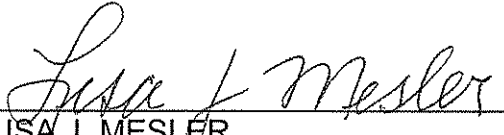
---

<sup>1</sup> As noted above, Person did not present any evidence to the district court of when he learned, or should have learned, that the Department of Correction had a copy of the PSI, which was prepared by one of its employees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 24th day of October 2008, served two true and correct copies of the attached BRIEF OF RESPONDENT by placing a copy in the United States mail, postage prepaid, addressed to:

DENNIS BENJAMIN  
Nevin, Benjamin, McKay &  
Bartlett, LLP  
PO Box 2772  
Boise, ID 83701

  
\_\_\_\_\_  
LISA J. MESLER  
Deputy Attorney General

LJM/pm